IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S BENCH BRIEF REGARDING
FED. R. EVID. 703 AND RELATED RESPONSE
TO DEFENDANTS' SUPPLEMENTAL BRIEF [DKT #2684]

Plaintiff, the State of Oklahoma ("the State"), hereby submits this bench brief to assist the Court with its evidentiary rulings involving the admission of evidence under Federal Rule of Evidence 703 and in specific response to Defendants' "Supplemental Brief Regarding Inability of Experts to Offer Inadmissible Facts as Opinion Evidence" ("Defs.' Supp. Brf.") [DKT #2684].

Discussion

Federal Rule of Evidence 703 allows the admission of the underlying information an expert reasonably relied upon – even if otherwise inadmissible – to assist the trier of fact in evaluating the expert's opinion. By way of background, prior to the 2000 Amendment, Federal Rule of Evidence 703 provided as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 703 (pre-2000 Amendment).

In December 2000, Rule 703 was amended to provide as follows (with the amended language emphasized below):

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

Fed. R. Evid. 703 (as amended) (emphasis added). Under either version of the Rule, the information reasonably relied upon by the expert – even if otherwise inadmissible – may be admitted in the context of a bench trial to assist the Court in evaluating the expert's opinion.

Defendants (1) misstate the impact of the 2000 Amendment on the admissibility of the information reasonably relied upon by an expert and (2) overstate the amendment's impact on Tenth Circuit precedent prior to the amendment. In so doing, they improperly suggest that Rule 703 as amended does not permit the admissibility of otherwise inadmissible evidence relied upon by an expert.

As the State has argued, the 2000 Amendment applies only in the context of a jury trial. First, the express language of the amendment itself requires such a construction. The amended language provides that "[f]acts or data that are otherwise inadmissible ***shall not be disclosed to the jury*** by the proponent of the opinion or inference unless the court determines that their probative value ***in assisting the jury*** to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. As is clear, the amended language is expressly limited to presentations of evidence in the context of a jury trial.

Second, the Advisory Committee Note to the 2000 Amendment also supports the conclusion that the amendment only impacts jury trials. The Note provides in part:

> The amendment governs only the disclosure ***to the jury*** of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. ***It is not intended to affect the admissibility of an expert's testimony.*** Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.
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> ***
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> This amendment covers facts or data that cannot be admitted for any purpose other than ***to assist the jury*** to evaluate the expert's opinion. . . .
>
> The amendment provides a presumption against disclosure ***to the jury*** of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.

Advisory Committee's Note to 2000 Amendment (emphasis added).

At least one court has expressly rejected the argument Defendants assert here, finding that the language added in the 2000 Amendment does not apply in a bench trial. In *ConsulNet Computing, Inc. v. Moore*, No. 04-3485, 2008 U.S. Dist. LEXIS 98855 (E.D. Pa. Dec. 5, 2008), the district court stated:

> *Rule 703* expressly permits experts to rely on inadmissible evidence. The main concern of *Rule 703* regarding placing limits on experts' use of inadmissible evidence deals with determining what evidence should or should not reach a jury. This damages trial is a bench trial. Accordingly, there is no need to limit Gering's testimony because it is based on inadmissible evidence, depositions, or affidavits. ConsulNet provides this court with no legal authority to suggest otherwise.

Id. at *22.

Even after the 2000 Amendment went into effect, courts have frequently admitted the expert's underlying relied-upon information – even in a jury setting – for the purpose of permitting the jury to evaluate the expert's testimony. *See, e.g., Valley View Angus Ranch v. Duke Energy Field Servs., LP.*, No. CIV-04-191, 2008 U.S. Dist. LEXIS 44181, at *18 (W.D. Okla. June 4, 2008) ("We have interpreted Rule 703 as allowing an expert to reveal the basis of

his testimony during direct examination, even if this basis is hearsay, provided that the facts or data underlying his conclusions are of a type reasonably relied upon by others in his field of expertise. *The hearsay is admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted*." (emphasis added) (internal quotation marks omitted)); *Sanchez v. Brokop*, 398 F. Supp. 2d 1177, 1192-93 (D.N.M. 2005) ("An expert witness may base his opinion on otherwise inadmissible evidence, and such evidence may be disclosed to the jury when the Court determines its probative value outweighs its prejudicial effect. . . . I evaluated the probative value of Dr. Kliman's testimony and its likely prejudicial effect and determined that it was necessary for the jury to hear what L.S. had said in order to properly evaluate the witness's diagnosis. Dr. Kliman's testimony about what L.S. had said was therefore admissible for purposes of rule 703." (citations omitted)). The same purpose would be served here by admitting the underlying information an expert reasonably relied upon, even if otherwise inadmissible.

As mentioned, Defendants grossly overstate the impact of the 2000 Amendment to Rule 703. Immediately following their quotation of Rule 703's language as amended, Defendants claim that "Rule 703 applies when the trial is to the bench." (*See* Defs.' Supp. Brf. at 2.) In support of such assertion, Defendants cite *Slicex, Inc. v. Aeroflex Colo. Springs, Inc.*, No. 2:04-cv-615, 2006 U.S. Dist. LEXIS 46775, at *6-7, 11 n.35 (D. Utah July 11, 2006), and *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1222 (D. Colo. 1998). The *In re Breast Implant Litigation* decision in 1998 obviously preceded the 2000 Amendment to Rule 703 and has no bearing on the amendment's scope. And the Utah district court's decision in *Slicex* does not support Defendants' position, as the decision literally makes no mention of the notion that the language added to Rule 703 by way of the 2000 Amendment applies in a bench trial.

Defendants also overreach in relying upon *Black v. M&W Gear Co.*, 269 F.3d 1220 (10th Cir. 2001), to suggest that "the third portion of Rule 703 [i.e., the 2000 Amendment] . . . overruled prior Tenth Circuit precedent." (Defs.' Supp. Brf. at 2.) In the context of a bench trial, however, it had no impact. Specifically, in dicta, the *Black* court remarked:

> [A]mended Rule 703 appears to conflict with prior circuit precedent. *Compare Kinser v. Gehl Co.*, 184 F.3d 1259, 1274-75 (10th Cir. 1999) (allowing expert to testify concerning documents, which could not be admitted into evidence because they were not authenticated, to demonstrate the basis for his expert opinion and explaining that 'experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance' [quoting Wright & Gold, Fed. Prac. & Proc. § 6273 (1997)]) . . . *with* Fed. R. Evid. 703 (as amended) ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

Black, 269 F.3d at 1228 n.3. As *Black*, *Kinser* and the amendment to Rule 703 all involve jury settings, the footnote is inapposite for the present case.

Moreover, nearly a decade after the 2000 Amendment, one of the leading commentaries, Wright & Gold on Federal Practice & Procedure, maintains the following view:

> Assuming Rule 703 permits an expert to give an opinion based on inadmissible evidence, the next question is whether the expert also can testify about that evidence in order to show the opinion has a sound basis. . . . An amendment to Rule 703 provides an answer to this issue: '[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.'
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> * * *
>
> [T]he very premise of Rule 703 that experts in a particular field can be expected to know when a type of evidence is sufficiently trustworthy and probative to merit reliance. ***Thus, experts may testify about the hearsay evidence they rely upon since such evidence is only excluded as a result of reliability concerns. While the trier of fact is certain to consider that evidence for the truth of the matters asserted, once the evidence passes the 'reasonably relied upon' test of Rule 703, it is sufficiently reliable to permit that consideration. . . .***

29 Wright & Gold, Fed. Prac. & Proc. § 6273 (2009) (emphasis added).

As Defendants themselves note, this was the practice of the Tenth Circuit *prior* to the 2000 amendment. Specifically, they quote *Hickock v. G.D. Searle & Co.*, 496 F.2d 444, 446-47 (10th Cir. 1974), for the proposition that "expert witnesses are allowed to testify to hearsay matters by reference to published materials [i.e., hearsay] 'solely to establish the basis for the expert's opinion, and not to establish the veracity of the hearsay matters themselves.'" (Defs.' Supp. Brf. at 5.)

Moreover, the two cases that defense counsel distributed during argument on October 13, 2009 also lend Defendants little support. First, in *Verizon Directories Corp. v. Yellow Book USA*, 331 F. Supp. 2d 134 (E.D.N.Y. 2004), the district court did not hold that Rule 703's requirement of a balancing test in a jury trial (i.e., the 2000 Amendment) also applied in a bench trial. Instead, the court noted – in support of its *admission* of the report at issue – that although the probative effect of the report was "almost nil, its potentially prejudicial effect has even less weight." *Id.* at 136. In support of that statement, the court cited Rule 703's amended language using the citation signal "*Cf.*" meaning "to compare."[1] This suggests that Judge Weinstein was not applying Rule 703's amended language as a matter of law, but merely referencing it by way of analogy.

Second, Defendants' reliance on *Mabrey v. Wizard Fisheries, Inc.*, No. C05-1499RSL, 2008 U.S. Dist. LEXIS 9985 (W.D. Wash. Jan. 8, 2008), is even more curious. In *Mabrey*, the

[1] The Bluebook defines "cf." as follows: "Cf. Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.' The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations (rule 1.5), however brief, are therefore strongly recommended." Bluebook R. 1.2(a) (18th ed. 2005).

district court stated that the effect of the reliance by one defense expert on facts and data from another defense expert "must be viewed in the context of a bench trial." *Id.* at *8. In support, it cited 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2885, at 454 (2d ed. 1995) for the statement: "***In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence***."[2] (Emphasis added.) Moreover, although the court went on to state that "given the context of a bench trial, the probative value of this information is substantially outweighed by its prejudicial value," *id.* at *9, the court cited parenthetically a Ninth Circuit Court of Appeals decision that, respectfully, did not correctly describe the 2000 Amendment.

In sum, the information that an expert reasonably relied upon – even if otherwise inadmissible – may be admitted for the purpose of assisting the trier of fact in evaluating the expert's opinion.

[2] Relatedly, it cannot be forgotten that the Federal Rules of Evidence have a "liberal thrust." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).

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